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No. 94-2106

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KENDALL H. BREEDLOVE,

Petitioner,

v.

TYSONS MANOR HOMEOWNERS ASSOCIATION AND CHARLOTTE M. SCHOW,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner, Kendall H. Breedlove, has standing to assert a cause of action under 42 U.S.C. Section 1983?

2. Whether the Fourth Circuit Court of Appeals properly affirmed the district court's ruling dismissing petitioner's Amended Complaint for failing to state a cause of action under 42 U.S.C. Section 1983?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 29.1, Respondents, Tysons Manor Homeowners Association and Charlotte M. Schow state that it does not have any parent companies or non-wholly owned subsidiaries. Charlotte M. Schow is an individual and Tysons Manor Homeowners Association is a home-owners association.

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Petitioner, Kendall H. Breedlove ("Breedlove") seeks to recover compensatory, general and punitive damages against respondents, Tysons Manor Homeowners Association and Charlotte M. Schow (hereinafter jointly "Tysons Manor HOA") under 42 U.S.C. Section 1983 alleging that Tysons Manor HOA acted under color of state law by filing a Memorandum of Lien against property he had once owned. The district court, by Order dated September 9, 1994, granted Tysons Manor HOA's Rule 12(b)(6) Motion to Dismiss finding that Breedlove failed to state a cause of action under 42 U.S.C. Section 1983. (Appendix to Petition for Writ of Certiorari ("Pet. App.") at A12). At the hearing on the Motion to Dismiss, the district court also questioned whether Breedlove had standing to bring this action since Breedlove admitted he no longer owned the property upon which the lien was filed, and therefore, agreed that "somebody else's title was clouded". (Appendix to Brief in Opposition ("Br. Opp. App.") at A10).

Breedlove appealed the district court's ruling to the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals affirmed the district court's ruling by Order dated April 4, 1995. (Pet. App. at A1-A2). The Fourth Circuit stated that

> [o]ur view of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *Breedlove v. Tysons Manor Homeowners Ass'n*, No. CA-94-647-A (E.D. Va.

September 9, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

Breedlove filed a Petition for Rehearing with the Fourth Circuit. By Order dated May 19, 1995, the Fourth Circuit denied the Petition for Rehearing. (Pet. App. at A3). Breedlove now appeals to this Honorable Court.

Respondents respectfully assert that the Fourth Circuit Court of Appeals properly affirmed the district court's ruling and contend that this Court should deny Breedlove's Petition for Writ of Certiorari. Breedlove not only failed to state a cause of action under 42 U.S.C. Section 1983 against respondents but he has absolutely no standing to pursue this matter. Moreover, there are no special and important reasons nor any of the grounds provided in Rule 10 of the Rules of the United States Supreme Court which warrant any review by this Honorable Court.

STATEMENT OF THE CASE

Breedlove filed an Original Complaint to the United States District Court for the Eastern District of Virginia (Alexandria Division) against respondents Tysons Manor Homeowners Association and Charlotte M. Schow alleging a cause of action under 42 U.S.C. Section 1983 and the Fourteenth Amendment of the United States Constitution.

Breedlove was a former owner of real property governed by the Tysons Manor Homeowners Association in Fairfax County, Virginia. (*See* Amended Complaint, paragraph 7). After he transferred title to this property to another individual, Tysons Manor HOA filed a Memorandum of Lien in the Circuit Court of Fairfax County allegedly due to Breedlove's failure to pay his homeowner's association dues. This Memorandum of Lien was recorded in the land records section of the Circuit Court of Fairfax County against the real property Breedlove had *formerly* owned. (*See* Amended Complaint, paragraph 10). Breedlove was unaware of this Memorandum of Lien until approximately six months after it had been filed when the new owner of the property brought it to his attention. (*See* Amended Complaint, paragraph 13).

A Certificate of Release of Memorandum of Lien was filed by Tysons Manor Homeowners Association and recorded in the land records of Fairfax County on December 12, 1993. (*See* Amended Complaint, paragraph 14). The owner of the property, who had purchased the land from Breedlove prior to the filing of the lien, paid the lien. *Id.*

Even though Breedlove had no ownership interest in the real property against which the Memorandum of Lien was filed, he alleges that he was deprived of "federally" protected civil rights and that the respondents, Tysons Manor Homeowners Association and its treasurer, Charlotte M. Schow, acted under "color of unconstitutional state law," specifically Virginia Code §§ 55-514-516, by obtaining "significant aid from state officials as the lien was recorded in land records."

Tysons Manor HOA filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure in response to Breedlove's Original Complaint alleging that Breedlove failed to state a cause of action upon which relief can be granted. Tysons Manor HOA asserted that it did not act under color of state law simply because a court clerk recorded the Memorandum of Lien that it had filed. The district court, after hearing argument from both parties, granted Tysons Manor HOA's Motion to Dismiss and allowed Breedlove fifteen days within which to file an Amended Complaint.

Breedlove filed an Amended Complaint essentially pleading the same facts and causes of action against Tysons Manor HOA as in his Original Complaint. Tysons Manor HOA filed another Rule 12(b)(6) Motion to Dismiss asserting that the Amended Complaint still failed to state a cause of action upon which relief can be granted and that there was no cure for this deficiency.

After hearing oral argument on Tysons Manor HOA's Rule 12(b)(6) Motion to Dismiss the Amended Complaint, the district court granted the Motion to Dismiss with prejudice. The court held that Breedlove failed to state a cause of action under 42 U.S.C. Section 1983 because there was "no state action," and further stated that

> "[t]his simple recording of a lien, which is a ministerial act required by law for the clerk to do, just simply is not the state action that *Lugar* is talking about." (Br. Opp. App. at A15).

Furthermore, the court questioned Breedlove's standing to bring this action based on the fact that Breedlove

did not even own the property upon which the lien was placed and queried as follows:

> Court: So you really didn't have a lien? Somebody else had the lien?
>
> Breedlove: Somebody else's title was clouded. And point of fact part of my allegations are that this infringed and invaded my liberty interest.
>
> Court: How would that be? If they didn't put a lien on you, they liened somebody else, he is the one that had the problem with the lien and not you.
>
> * * *
>
> Court: But they didn't attach anything. In fact, they didn't even get it on your property from what you tell me. (Br. Opp. at A10, A14).

The Fourth Circuit Court of Appeals affirmed the district court's ruling dismissing Breedlove's Amended Complaint and denied Breedlove's Petition for Rehearing.

SUMMARY OF ARGUMENT

Breedlove has no standing to assert a cause of action, and therefore, this eliminates any need to consider this matter on its merits. Moreover, even assuming Breedlove has standing, he has failed to state a cause of action under 42 U.S.C. Section 1983 upon which relief can be granted because he was not deprived of any federally

protected rights and the respondents did not act under "color of state law."

ARGUMENT

I. BREEDLOVE HAS NO STANDING TO ASSERT A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 OR ANY VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy" as to show that he has sustained or is immediately in danger of sustaining some direct injury and not merely that the party suffers in some indefinite way in common with people generally. *Baker v. Carr*, 369 U.S. 186 (1962). In order to be entitled to any judicial relief, the requisites of standing must be alleged and shown. *Brown v. Lutz*, 316 F.Supp. 1096 (E.D. La. 1970). To have standing, Breedlove must allege that "the challenged action has caused him 'injury in fact' and demonstrate a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). The standing in question is essentially "whether the constitution or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Generally, a party cannot advance the rights of others. *County Court of Ulster County v. Allen*, 414 U.S. 140, 154-63 (1979).

Here, Breedlove is not entitled to any judicial relief for any alleged deprivation of due process. He had absolutely no ownership interest in the property upon which the lien was filed; "somebody else's title was clouded." The owner of the property paid the lien; Breedlove did not pay to have the lien removed. Breedlove suffered "no injury in fact"; Breedlove has no "personal stake in the outcome of the controversy" as to give him standing to bring this suit. Thus, since Breedlove cannot establish the requisite standing which must be alleged and shown, this eliminates any need to consider the matter on its merits.

II. EVEN ASSUMING THAT BREEDLOVE HAD STANDING TO BRING AN ACTION, THE FOURTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S RULING GRANTING TYSONS MANOR HOA'S 12(b)(6) MOTION TO DISMISS BECAUSE BREEDLOVE FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 IN HIS AMENDED COMPLAINT.

Title 42 U.S.C. Section 1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory . . . "[1] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 925 (1982).

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[1] 42 U.S.C. Section 1983 states that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the

The following elements are necessary to support a proper cause of action under 42 U.S.C. Section 1983:

(1) plaintiff must allege violation of rights secured by the Constitution and laws of the United States; and

(2) plaintiff must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42 (1988); *B.M.H. by C.D. v. Schoolboard of City of Chesapeake, Virginia*, 833 F.Supp. 560 (E.D. Va. 1993).

In the present case, Breedlove has failed to state a cause of action under 42 U.S.C. Section 1983 upon which relief can be granted. First, Breedlove was not deprived of any federally protected rights. Second, Tysons Manor HOA did not act under "color of state law."

A. Breedlove was not deprived of any federally protected rights.

Breedlove alleges that his constitutional rights had been violated because Tysons Manor HOA filed a Memorandum of Lien which was recorded in the land records of the Circuit Court of Fairax County against real property that he had once owned. At the time the lien was filed and recorded, Breedlove had already transferred the title of the property to another individual. Breedlove claims that Tysons Manor HOA acted under color of state

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deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress. . . .

law because a clerk of Fairfax County Circuit Court performed the ministerial act of recording the lien. Therefore, he asserts that he has a cause of action under 42 U.S.C. Section 1983.

The recording of the lien did not deprive Breedlove of any of his federally protected rights. Breedlove did not own the property; therefore, none of his property rights were violated. Furthermore, none of Breedlove's property was either garnished, seized, attached or sequestered. *Cf. Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). None of his due process rights were violated because nothing was taken from him. Therefore, Breedlove cannot establish the necessary element of being deprived of a federally protected right to support a cause of action under 42 U.S.C. Section 1983. *See B.M.H. by C.B. v. Schoolboard of City of Chesapeake, Virginia*, 833 F.Supp. 560 (E.D. Va. 1993).

B. Tysons Manor HOA did not act under color of state law.

In order to maintain a cause of action under 42 U.S.C. Section 1983 against a private individual, it must also be shown that the conduct allegedly causing the deprivation of a federal right is fairly attributable to the state. *Lugar*, 457 U.S. at 937. This question of "fair attribution" requires a two-part approach. First, the deprivation must be caused by the exercise of some right or privilege created by the state. *Id.* Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. *Id.* This may be because he is a state official, obtained significant aid from state officials, or

because his conduct is otherwise chargeable to the state. *Id.*

Even *assuming arguendo* that some type of deprivation occurred, Breedlove has failed to state facts upon which Tyson Manor HOA may fairly be said to be a "state actor." In this case, the court clerk's simple act of recording a Memorandum of Lien against property once owned by Breedlove is a ministerial function which does not satisfy the Section 1983 requirement of Tysons Manor HOA acting under color of state law. *See generally Hinman v. Lincoln Towing Service, Inc.*, 771 F.2d 189 (7th Cir. 1985); *Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976). The mere invocation of state legal procedures does not constitute "joint participation" or "conspiracy" with state officials necessary to establish a cause of action under Section 1983. *Lugar*, 457 U.S. at 941, n.21.

In *Lugar*, the Supreme Court held that in the context of a pre-judgment attachment action a private party's joint participation with state officials in the seizure of the disputed property is sufficient to characterize that party as a "state actor." *Lugar*, 457 U.S. at 941. Unlike the case at bar, the defendant in *Lugar* filed an ex parte application for the prejudgment attachment of property. *Id.* at 925. A clerk of court issued the writ of attachment and the sheriff subsequently executed the writ. *Id.* Plaintiff's property was sequestered. *Id.* After a hearing thirty-four days later, the trial court dismissed the attachment because the statutory requirements had not been met. *Id.* The plaintiff brought a 42 U.S.C. Section 1983 action against the defendant alleging that in attaching his property, defendant had acted jointly with the state to deprive him of property without due process of law. *Id.* The

Supreme Court held that the plaintiff had stated a proper cause of action under 42 U.S.C. Section 1983 in the context of a pre-judgment attachment action. *Id.*

Here, Breedlove has established only that a Circuit Court clerk filed a Memorandum of Lien against property he no longer owned. He cannot meet the two-part test set forth in *Lugar* to show that he was deprived of any federally protected civil right or Tysons Manor HOA acted under color of state law. The facts of this case, even when construed in the light most favorable to Breedlove, simply do not support any allegation that respondents acted under color of state law.

Moreover, the facts of the present case are easily distinguishable from *Lugar v. Edmondson Oil Co.* First, Tysons Manor HOA did not seek pre-judgment attachment against any property owned by Breedlove. In fact, no property owned by Breedlove was ever attached, garnished, seized or sequestered. Thus, Breedlove was deprived of none of his federally protected rights. Second, Tysons Manor HOA did not act under color of state law by merely filing a Memorandum of Lien pursuant to Virginia Code §55-516 which was subsequently recorded by a clerk of court. Unlike the facts in *Lugar,* Tysons Manor HOA did not act jointly with the state to deprive Breedlove of his property without due process.

III. BREEDLOVE ERRONEOUSLY RELIES ON *COLEMAN V. THOMPSON,* 501 U.S. 722 (1991), FOR THE PROPOSITION THAT THE FOURTH CIRCUIT COURT OF APPEALS HAD TO SET FORTH WRITTEN DETERMINATIONS IN ITS ORDER AFFIRMING THE DISTRICT COURT'S RULING.

Breedlove cites *Coleman v. Thompson,* 501 U.S. 722 (1991), for the erroneous proposition that the Fourth

Circuit Court of Appeals was required to write an opinion on the reasons for which they affirmed the district court's ruling. The case of *Coleman v. Thompson* concerns the requirements necessary to dismiss a federal habeas corpus review for a state court procedural default. This case is simply not relevant, material, or controlling in this case. Moreover, the Fourth Circuit Court of Appeals clearly indicated that it found Breedlove's appeal without merit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 19, 1995

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KENDALL H. BREEDLOVE, Plaintiff, -vs- TYSONS MANOR HOMEOWNERS ASSOCIATION, et al., Defendants.	C.A. No. 94-647-A

HEARING ON MOTIONS

September 9, 1994

Before: Claude M. Hilton, Judge

APPEARANCES:

Kendall H. Breedlove, Pro Se

Melissa S. Hogue, Counsel for the Defendants

[p. 2] THE CLERK: Civil action 94-647-A, Kendall H. Breedlove versus Tysons Manor Homeowners Association, et al. Are counsel present and ready, please?

MS. HOGUE: Good morning, Your Honor. My name is Melissa Hogue, and I am here on behalf of the defendants Tysons Manor Homeowners Association and Charlotte Schow.

We are here before the Court today on our motion to dismiss plaintiff's amended complaint pursuant to Rule 12(b)(6).

MR. BREEDLOVE: Your Honor, there are three motions noticed for today.

MS. HOGUE: That is correct, Your Honor. The plaintiff has two motions –

MR. BREEDLOVE: I would suggest that since one is a motion for extension of time to file affidavit pertaining to hearing a motion to dismiss and one is a motion that this Court publish its findings, I believe it would be appropriate to hear those motions first before Your Honor hears the motion to dismiss.

THE COURT: Well, it might be appropriate to hear the motion to extend time, and I will just listen to these other motions.

MS. HOGUE: Yes, sir, Your Honor.

THE COURT: Why do you need time to file an affidavit on a motion to dismiss?

[p. 3] MR. BREEDLOVE: Your Honor, at the time this was noticed my time was unfortunately heavily consumed with filing a major filing with the United States Supreme Court and with filing a written statement of facts with the Arlington County Circuit Court, the timing of which is driven by court rules that did not permit altering its timing.

THE COURT: Well, I can appreciate that, but what relevance would an affidavit have on a motion to

dismiss which just challenges the four corners of your complaint or your amended complaint?

MR. BREEDLOVE: As I understood, and perhaps I may have misunderstood, but as I understood the substance of this Court's Local Rule 11(m), the requirement set forth was that the party to the complaint file any relevant affidavits since the Court's hearing of a motion to dismiss was equivalent to a summary judgment proceeding.

THE COURT: Well, there is nothing in this motion that would be the equivalent of a summary judgment proceeding. I am not looking at any of the evidence. Her motions only go to what is stated in the four corners of your pleading.

I mean, this isn't a motion to the jurisdiction where I would look at some facts to ascertain whether or not there was jurisdiction, or it is not a summary judgment. They only attack the four corners of your pleadings, as I [p. 4] understand their motion.

MR. BREEDLOVE: That is why there was some confusion with the Local Rule and the notice which the opponent filed.

THE COURT: The Local Rule is there for the purpose of setting a time limit for you to file those items if they be relevant to the motion that is here. But I don't believe this motion to dismiss deals with anything other than what you have set out in your pleading. So, therefore, I couldn't look to the evidence or look to any affidavits. I have got to take – I have got to accept on their motion what you say in your affidavit as true. I mean, if

they want to get into the evidence, whatever you say in there I have got to accept as true. They just say taking everything you say, it still doesn't state a cause of action, as I understand their motion.

MR. BREEDLOVE: That would be my understanding of the motion as well, Your Honor.

THE COURT: All right. So, your motion to grant more time to file an affidavit will be denied, because I don't find an affidavit to be relevant to the issues before us.

As to publishing the opinion, I am not inclined to publish this opinion at all or even write an opinion. I have stated my reasons from the bench and you have those to pursue [p. 5] this manner in whatever manner you want to. I am not inclined to do any further writing on the case.

MR. BREEDLOVE: Then you are denying my motion to publish an opinion of this Court?

THE COURT: I am not even going to write an opinion. So, I don't have anything to publish.

MR. BREEDLOVE: All right. One other item, Your Honor. As I had to prepare the memorandum in opposition to the defendants' motion and that got into substantial discussion of the unconstitutionality allegations of the Virginia statute, I'm asking now whether under the provisions of 28 U.S.C. Section 2403(b), whether this Court can today hear this motion. That particular citation being the requirement that whenever a state statute is challenged, that the state's Attorney General be notified. And as yet I have not done that. And it

became questionable in my mind as I prepared that memorandum and the degree to which it was evident that this case has to challenge the state's Constitution, the law, the constitutionality of the state's law, it then seemed to me that perhaps that provision of the federal code was invoked. And without that notification to the Attorney General, I'm asking whether this Court can hear that question.

THE COURT: Well, let me go ahead and hear the motion and you can raise that in whatever argument you want [p. 6] in opposition to their motion.

MS. HOGUE: Thank you, Your Honor. As stated, we have filed another motion to dismiss the plaintiff's amended complaint. As this Court knows, we were before this Court on a motion to dismiss plaintiff's original complaint which this Court granted on July 8, 1994. It is still our position that the plaintiff has failed to state a claim for which relief can be granted. We submit the deficiency is still present and that there is no cure and, therefore, this case should be dismissed with prejudice.

I believe that the Court is familiar with the facts. And unless you would like me to, Your Honor, I will dispense with review of the facts.

THE COURT: You can do that.

MS. HOGUE: All right. There is two primary and compelling reasons why the amended complaint should be dismissed with prejudice, Your Honor. In order for an action under 42 U.S.C. Section 1983 to exist, defendants must have acted under color of state law.

Defendants are a homeowners association and its treasurer. They are not government officials, employees or agents of the government. Defendants are simply private individuals exercising its rights defined by Virginia Code. The defendants in this case, Your Honor, did no more than invoke a presumptively valid state lien procedure. Their [p. 7] essentially private conduct could not be fairly attributable to the state.

In this case the Fairfax County Clerk's ministerial function of reporting the lien upon defendants' invocation of the state legal procedures does not constitute joint participation or conspiracy with state officials satisfying Section 1983's requirement of acting under color of state law.

Additionally, Your Honor, we would still submit that there are adequate state remedies that are available to plaintiff in this case. And, therefore, he has not alleged a cause of action under Section 1983 as a matter of law which this Court can hear.

Thank you, Your Honor.

THE COURT: All right.

MR. BREEDLOVE: Addressing these points in perhaps reverse order. As to the availability of state remedies, Section 1983 does not require that state remedies be exhausted before invoking Section 1983 of the U.S. Code.

In point of fact, however, my litigation of a similar complaint in the Virginia courts has demonstrated that redress for a false or libelous or malicious lien are not available through the Virginia courts by causes of action

for common law defamation, statutory defamation, slander of title, malicious prosecution, abuse of process or civil [p. 8] conspiracy. And as a consequence of all of those actions being rather summarily turned out of court prior to ever reaching a jury, those are currently either pending appeal or on their way up the appeal ladder.

As a consequence of the personal experience, I can say that in Virginia there is no common law redress for a lien which is false or malicious or fraudulent.

Next. The defendants have alleged that they did no more than invoke a state statute for the Virginia property owners lien, which I believe is section, is Title 55 Section 516 of the Virginia Code. I presume from their assertion that they are saying they innocently invoked that statute. In point of fact, their argument is defective because they did not comply with the statute in a number of ways, but most particularly of importance at this time, since this is a question having to do largely with the denial of due process, the Virginia state statute requires a ten day prior notice before the lien attaches.

Had they complied in full with the Virginia statute, it seems they might at least, arguendo, be able to assert a defense that they were following the statute in good faith. In point of fact they did not follow the statute in good faith.

THE COURT: Well, if you have litigated that in the state court, why didn't you get that lien removed then if [p. 9] they didn't follow the statute?

MR. BREEDLOVE: Your Honor, under Virginia property owner association lien laws, there is no provision under the statutes to contest a lien in court.

THE COURT: Why didn't you file a petition to remove the lien?

MR. BREEDLOVE: While there is, for example, in the mechanic's lien statutes a provision to challenge the statute, there is not the similar provision under the property owner association law.

THE COURT: Well, why in the common law can't you petition to remove a lien that is improperly placed on you?

MR. BREEDLOVE: I am not prepared to be able to answer that question at this time, Your Honor.

THE COURT: I mean, you say that somebody put a lien on it, they didn't comply with the statute, with notice before they put it on. Well, that seems to me to be a pretty simple thing to remedy if that's in fact the case.

MR. BREEDLOVE: If I may, Your Honor, rather additionally. Although they liened property in my name, they did not lien my property. The property which they liened and which the case of *Wallace versus Brumback* indicates they would have the requirement to determine from the public records the ownership of the property which they proposed to lien, in fact they did not bother to determine from the court [p. 10] records, or, excuse me, from the public records, the public land records who owned the property. And they liened the property belonging to another owner. Also a rather major defect with the lien.

THE COURT: How do you manage to do that when you file a lien on – They just filed a lien in the land records. Did they put it on a specific piece of property?

MR. BREEDLOVE: Yes, sir, Your Honor.

THE COURT: All right.

MR. BREEDLOVE: The requirements for the lien are that it must cite the –

THE COURT: So, you really didn't have a lien? Somebody else had the lien?

MR. BREEDLOVE: Somebody else's title was clouded. In point of fact part of my allegations are that this infringed and invaded my liberty interest.

THE COURT: How would that be? If they didn't put a lien on you, they liened somebody else, he is the one that had the problem with the lien and not you.

MR. BREEDLOVE: When it is in your name, it affects you.

THE COURT: How did it affect you?

MR. BREEDLOVE: The effect is that that lien did at that time and continues to bear witness in the public land records, which are regularly searched by credit agencies, [p. 11] that I did not pay an alleged debt, had to be liened for it. The lien was subsequently satisfied by the subsequent owner of the property. And there is now remaining the appearance in the public records that I had to be liened for a debt which was then subsequently settled, compromised, satisfied. The witness that that bears is untrue.

The next item, I again point out that it is not necessary under Section 1983 to exhaust state remedies. They are written in the law as being available concurrently.

The arguments in *Lugar* and in some of the other cases dealing with similar subject matter raise the question typically in the dissent opinions as to whether or not a good faith defense should be available to a defendant under Section 1983. The courts have not currently stated a conclusion as to the specific availability of such good faith defense being offered, indicating that it would be an affirmative defense if it were to exist. It would be one which they would raise in their answer.

Their arguments are in essence that they are raising this good faith defense that they merely invoked a presumptively valid state statute. There being two major difficulties with that argument. One, which I have already touched on, is that they did not in good faith follow the statute. Okay. That in particular the due process, which the Supreme Court in *Mullane versus Central Hanover Bank* and [p. 12] its progeny has set forth as the minimum requirement of the Constitution, being notice and an opportunity to be heard, the notice portion of it, which has been incorporated in the state statute, they did not follow. And my allegations are that their actions are wanton, willful disregard of the rights of others, which is a part of malice.

THE COURT: Well, I understand that. The problem you have got is state action though. Where is the state action?

MR. BREEDLOVE: Yes, if I may, Your Honor. *Lugar versus Edmondson Oil Company* sets forth that in

circumstances of prejudgment attachment and the allegations of unconstitutionality of a state statute, that the only requirements for state action, for the defendants to be determined state actors is that they invoked the state law.

And the defendants' arguments parallel the arguments that were made by the respondent in *Lugar versus Edmondson Oil* which were first upheld by the District Court, next upheld by the Fourth Circuit Court of Appeals, but specifically and explicitly reversed by the United States Supreme Court with a particular note that the Fourth Circuit Court of Appeals was erroneous in its opinion.

And the Supreme Court said in *Lugar,* the Court of Appeals, that is from the Fourth Circuit, erred in holding that in this context joint participation required something [p. 13] more than invoking the aid of state officials to take advantage of state created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the state has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute. In summary, petitioner was deprived of his property through state action. Respondents were, therefore, acting under color of state law in participating in that deprivation.

If I may also, Your Honor, draw your attention to the Fifth Circuit *Folsom Investment Company, Incorporated versus Moore,* where the Court of Appeals said that the Supreme Court reversed the Fourth Circuit in *Lugar* and held that when a Section 1983 plaintiff challenges the

constitutionality of a state attachment procedure as opposed to making mere nonconstitutional allegations of misuse or abuse of the statute, the private party who sets that attachment scheme in motion is to be considered a state actor. Citations there.

So, insofar as Folsom and the Scullins have alleged that the Louisiana attachment scheme is violative of the Constitution, the private parties who set that scheme in motion acted under color of state law. And that's *Folsom* [p. 14] *versus Moore,* 681 F.2d 1032 at 1037, Fifth Circuit, 1982.

The Mississippi District Court, having quoted that exact paragraph in the case of *Lomax versus Davis,* went on to say the same is true of any state statute or procedure used by a private party to deprive an individual of his civil rights.

In my amended complaint I have alleged the unconstitutionality of the state statute. I have alleged that the lien was used for prejudgment attachment. And I stand ready by evidence to prove that allegation. I have alleged that the –

THE COURT: But they didn't attach anything. In fact, they didn't even get it on your property from what you tell me.

MR. BREEDLOVE: Your Honor, the question of whether or not a property or my property was attached is one of the questions of whether or not my civil rights have been violated. The others involve liberty interest, they involve the deprivation of due process, they involve the deprivation of equal protection under law. Whether

or not those occurred are questions of fact. And I would submit that to make any decision on them would be to invade the prerogatives of the jury to determine questions of fact.

I believe that it is appropriate that this case proceed forward toward jury trial, that it may be tried [p. 15] before a jury and the results to come forth as they may.

THE COURT: All right. Well, I understand your position, but I believe, Mr. Breedlove, that your reliance on *Lugar* and those cases decided under it is a bit misplaced. This simple recording of a lien, which is a ministerial act required by law for the clerk to do, just simply isn't the state action that *Lugar* is talking about.

And I find that there is still no state action alleged in this amended complaint. I am going to grant the defendants' motion to dismiss. However, any state claims which may be stated in this complaint will be dismissed without prejudice and you are free to pursue whatever constitutional challenges or whatever actions you may have in the state courts to deal with the problem. They will be dismissed without prejudice.

MS. HOGUE: Thank you, Your Honor.

MR. BREEDLOVE: Thank you, Your Honor.

MS. HOGUE: Your Honor, is there a time limitation if Mr. Breedlove decides to pursue any state claims he feels he has?

THE COURT: Only the statute of limitations as far as I know or whatever else may – I wouldn't hazard a guess as to what limitations there may be, but I am not

going to place any limitations on whatever actions he wants to.

MS. HOGUE: Thank you, Your Honor.

[p. 16] MR. BREEDLOVE: Thank you, Your Honor.

THE COURT: All right. If that concludes our docket, we will adjourn until Monday morning at 9 o'clock.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

COPY

Norman B. Linnell, CP, CM, CE